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Prejudice and Retroactivity: Limits on Habeas Relief in Lockhart v. Fretwell

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Note

PREJUDICE AND RETROACTIVITY: LIMITS ON HABEAS RELIEF IN *LOCKHART V. FRETWELL*

INTRODUCTION

In *Lockhart v. Fretwell*,[1] the Supreme Court considered whether, in a capital sentencing proceeding, an attorney's failure to make an objection that would have been supported by a decision which later was overruled constituted ineffective assistance of counsel under the Sixth Amendment.[2] The Court held that because the objection would not be sustained under current law, the criminal defendant suffered no prejudice.[3] Consequently, counsel's assistance was not ineffective.[4] Moreover, the Court maintained that the retroactive application of new rules in federal habeas corpus appeals is permissible when the application of the new rule does not undermine a state's finality and reliance interests.[5] In so holding, the Court modified the prejudice prong of the test for ineffective assistance of counsel announced in *Strickland v. Washington*[6] and effectively created a third exception to the retroactivity rule set forth in *Teague v. Lane*.[7]

This Note will review the legal background of the *Fretwell* decision with attention to the development of the prejudice standard for ineffective assistance of counsel claims and the evolution of the retroactivity rule in the context of habeas corpus. The Note will argue that while the Court's modification of the *Strickland* prejudice prong will make ineffective assistance of counsel claims more difficult to prove, its alteration of the *Teague* standard may have an even broader impact. The *Fretwell* holding implies that defendants who suffer errors based on the law in force at the time of trial must make their case for federal

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1. 113 S. Ct. 838 (1993).

2. U.S. CONST. amend. VI. The Sixth Amendment guarantees the right to assistance of counsel in criminal prosecutions. It has been consistently construed to include the right to effective assistance of counsel. Katherine M. McCormack-Traugott, Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 GEO. L.J. 939, 1354 (1992) [hereinafter Project]. The right to effective assistance of counsel extends to the sentencing phase of a capital proceeding. *See id.* at 1361 n.1684.

3. *Fretwell*, 113 S. Ct. at 844.

4. *Id.*

5. *Id.*

6. 466 U.S. 668 (1984).

7. 489 U.S. 288 (1989).

habeas relief under subsequent precedent whenever subsequent precedent benefits the state's defense against collateral attack.

I. THE CASE

In 1985, an Arkansas jury convicted Bobby Ray Fretwell of capital murder for committing a fatal shooting in the course of a robbery.[8] At Fretwell's sentencing hearing, the State argued that the jury should consider two aggravating factors in deciding whether to impose the death penalty: (1) that the murder was committed for pecuniary gain and (2) that the murder was committed to facilitate Fretwell's escape.[9] The jury found evidence of the first aggravating factor and sentenced Fretwell to death.[10]

On direct appeal to the Arkansas Supreme Court,[11] Fretwell argued that his sentence should be vacated based on the holding in *Collins v. Lockhart*.[12] In *Collins*, the Court of Appeals for the Eighth Circuit found unconstitutional the Arkansas courts' practice of allowing juries to consider killing for pecuniary gain as both an element of felony murder and an aggravating circumstance to be considered in deliberating on the death penalty.[13] The Arkansas court refused to consider the *Collins* question because Fretwell's counsel had failed to object to the use of the pecuniary gain aggravating factor during the sentencing hearing.[14] Consequently, the Court upheld Fretwell's death sentence.[15]

After exhausting his state habeas remedies,[16] Fretwell brought a petition in federal district court claiming ineffective assistance of

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8. Fretwell v. Lockhart, 739 F. Supp. 1334, 1335 (E.D. Ark. 1990), *aff'd*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993).

9. *Id.*

10. *Id.*

11. Fretwell v. State, 708 S.W.2d 630 (Ark. 1986).

12. 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013 (1985).

13. *Id.* at 263. The court found this "double-counting" unconstitutional because it failed to legitimately distinguish between felony-murderers who should be subject to the death penalty and those who should be awarded a more lenient sentence. *Id.* at 264. Moreover, "double-counting" can lead the jury to mistakenly believe that it has already resolved the death penalty question during the guilt phase of the trial. *Id.*

14. *Fretwell*, 708 S.W.2d at 634.

15. *Id.*

16. Fretwell filed a state habeas corpus petition citing his counsel's failure to make a *Collins* objection as evidence of ineffective assistance of counsel. Fretwell v. State, 728 S.W.2d 180 (Ark. 1987). Because at the time of Fretwell's trial the Arkansas courts had yet to rule on whether the Eighth Circuit's interpretation of the Arkansas statute was in harmony with state court interpretation, the Arkansas Supreme Court rejected Fretwell's habeas claim. *Id.* at 181.

counsel.[17] Applying the two-pronged test set forth in *Strickland*,[18] the District Court for the Eastern District of Arkansas held that counsel's failure to object at sentencing to the submission of pecuniary gain as a potential aggravating circumstance constituted deficient performance and was prejudicial,[19] even though the Eighth Circuit had subsequently overruled *Collins* in *Perry v. Lockhart*.[20] On appeal, the Court of Appeals for the Eighth Circuit affirmed and remanded to the District Court with instructions to reduce Fretwell's sentence to life in prison without parole.[21]

II. THE COURT'S REASONING

The Supreme Court granted certiorari in *Fretwell* to consider whether an ineffective assistance of counsel claim satisfied the *Strickland* prejudice standard[22] when counsel's performance was prejudicial as gauged by precedent valid at the time of the legal proceeding, but overruled by the time of the appeal.[23] The Court held that if new legal rules invalidated the "substantive or procedural" right that formed the basis of a petitioner's habeas claim, counsel's performance would not be deemed prejudicial because it would not deny the petitioner a right protected by law.[24] Noting that, unlike the state, a habeas petitioner has no interest in the finality of the state court judgment rendered in the original proceeding, the Court also held that new legal rules that benefit the State can be applied retroactively in adjudicating a habeas claim.[25]

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17. Fretwell v. Lockhart, 739 F. Supp. 1334 (E.D. Ark. 1990). Fretwell's ineffective assistance of counsel claim was made pursuant to 28 U.S.C. § 2254.

18. 466 U.S. 668, 687 (1984). To successfully advance an ineffective assistance of counsel claim, a defendant must show that counsel's performance was both deficient and prejudicial. A defendant may show deficient performance by demonstrating that counsel's performance was unreasonable under legal standards applicable at the time of the proceeding. *Id.* Prejudice is demonstrated by showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

19. *Fretwell*, 739 F. Supp. at 1337.

20. 871 F.2d 1384 (8th Cir. 1989) (holding that the Constitution does not bar the use of killing for pecuniary gain as both an element of the offense of felony-murder and an aggravating factor in a capital sentencing proceeding).

21. Fretwell v. Lockhart, 946 F.2d 571, 577 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993). Noting that Fretwell was entitled to the benefit of a *Collins* objection at the time of trial, the Eighth Circuit held that sentencing him under current law would "perpetuate the prejudice caused by the original sixth amendment violation." *Id.* at 578.

22. *See supra* note 18.

23. *Fretwell*, 113 S. Ct. 838, 841 (1993). The State conceded that counsel's performance was deficient; the only question before the Court was whether that performance resulted in prejudice. *Id.* at 842 n.1.

24. *Id.* at 844.

25. *Id.*

Writing for the majority, Chief Justice Rehnquist reasoned that a *Strickland* prejudice analysis should not focus solely on whether the outcome of a trial would have been different but for counsel's errors.[26] Rather, a *Strickland* inquiry implicates the fundamental fairness and reliability of the legal proceeding in question.[27] For a trial to be unfair, it must deny the defendant a "substantive or procedural" right.[28] According to the Court, Fretwell was not denied any rights because the decision that granted them—*Collins*—had since been overruled.[29] Though the Court conceded that the outcome of Fretwell's sentencing proceeding would likely have been different had his attorney made an objection based on *Collins*, it argued that to find prejudice now would grant Fretwell a "windfall" to which he was not entitled.[30]

The Court also held that while the deficient performance prong of the test required an assessment of counsel's performance from a perspective contemporaneous with the time of trial, the prejudice prong could be evaluated from a hindsight perspective.[31] According to the Court, the use of a hindsight perspective in the prejudice evaluation did not have the potential to interfere with counsel's "ardor" and "independence" like its use in the deficient performance assessment. Because the prejudice evaluation focuses only on the *impact* of counsel's deficient performance and not on counsel's professional judgment at the time of trial, it does not result in judicial "second-guessing" of an attorney's work.[32] The Court maintained that this use of a hindsight framework was not inconsistent with the *Teague* rule[33] limiting the retroactive application of "new rules" on collateral review.[34] Thus, the *Perry* decision overturning *Collins* could be applied retroactively to Fretwell's habeas petition. Because Fretwell's attorney had not made a *Collins* objection and, consequently, the State had not

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26. *See id.* at 842.

27. *Id.*

28. *Id.* at 844.

29. *See id.* ("[I]t was the premise of our grant in this case that *Perry* was correctly decided, *i.e.*, that respondent was not entitled to an objection based on 'double counting.' Respondent therefore suffered no prejudice from his counsel's deficient performance.").

30. *Id.* at 843.

31. *Id.* at 844.

32. *Id.*

33. In Teague v. Lane, 489 U.S. 288 (1989), the Court held that new rules will not be applied retroactively to petitioners on habeas review unless the rule "places 'certain kinds of . . . conduct beyond the power of the criminal law-making authority to proscribe'" or involves a major revision of the court's understanding of a petitioner's procedural constitutional rights. *Id.* at 311-12 (quoting Mackey v. United States, 401 U.S. 677, 692 (1971) (Harlan, J., concurring in judgment and dissenting in part)).

34. *Id.* at 316.

relied on *Collins*, the State had no need to protect its finality and reliance interests as provided for by the *Teague* rule.[35] The Court maintained that this holding was a "perfectly logical limitation of *Teague* to the circumstances which gave rise to it."[36]

Justice O'Connor concurred, stating that the *Fretwell* holding was merely a product of the unusual circumstances presented when a habeas petitioner advances a prejudice claim by urging a "decidedly incorrect point of law."[37] For most ineffective assistance of counsel claims, she reasoned, the *Strickland* rule assessing the effect of counsel's error on the outcome of the proceeding would remain the operative standard.[38] Justice Thomas also concurred, writing separately to argue that the Eighth Circuit misunderstood the Supremacy Clause when it suggested that the Arkansas courts were bound to follow the *Collins* decision.[39]

Justice Stevens dissented, filing an opinion in which Justice Blackmun joined.[40] The dissenters argued that the result in *Fretwell* meant that through "coincidence . . . and fortuitous timing" states may carry out death sentences that were "invalid when imposed."[41] The dissenters contended that the majority accomplished this result through the retroactive application of two changes in the law that occurred after Fretwell's trial: (1) the rule in *Perry* holding double-counting constitutional and (2) the introduction of a hindsight perspective in the prejudice prong of the *Strickland* standard.[42] The dissenters argued that the Court ignored *Strickland*'s emphasis on the outcome of the proceeding by requiring that a defendant show an "*additional* indicia of unreliability" when advancing prejudice claims.[43] They further asserted that in adopting a hindsight framework, the Court inequitably applied the retroactivity rule of *Teague* creating, in effect, a "windfall" for State courts.[44]

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35. *Fretwell*, 113 S. Ct. at 844.
36. *Id.*
37. *Id.* at 845 (O'Connor, J., concurring).
38. *Id.*
39. *Id.* at 846 (Thomas, J., concurring).
40. *Id.* (Stevens, J., dissenting).
41. *Id.*
42. *Id.*
43. *Id.* at 848.
44. *Id.* at 853.

III. LEGAL CONTEXT

A. *Ineffective Assistance of Counsel and the Prejudice Requirement*

A defendant may collaterally attack a final judgment by claiming that her Sixth Amendment guarantee to a fair trial was violated by ineffective assistance of counsel.[45] Prior to 1984, state and lower federal courts nearly uniformly applied a general reasonableness standard for evaluating the performance of counsel,[46] but applied different tests to evaluate the prejudice caused by counsel's performance.[47] Thus, the Supreme Court granted certiorari in *Strickland v. Washington* to develop coherent standards by which to judge ineffective assistance of counsel claims.[48] In *Strickland*, the Court developed a two-pronged test: criminal defendants claiming ineffective assistance of counsel at trial must show deficient performance[49] and prejudice.[50] To show prejudice under *Strickland*, the defendant had to show "a reasonable probability[51] that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[52]

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45. Project, *supra* note 2, at 1363. The ingredients necessary for a "fair trial" are defined in the Sixth Amendment. They include speed, publicness, impartiality, issues and law ascertained prior to the proceeding, provision for witnesses for and against the accused, and the assistance of counsel. U.S. CONST. amend. VI.

46. Strickland v. Washington, 466 U.S. 686, 683-84, 696-97 (1984).

47. *Id.* at 684.

48. *Id.*

49. *Id.* at 687. A defendant may show deficient performance by demonstrating that counsel's performance was unreasonable under current professional standards. *Id.* at 687-88. While the *Strickland* Court maintained that more exacting standards were inappropriate, it did recognize a wide range of basic duties for which defense counsel may be accountable. These include the duties to avoid conflicts of interest, advocate for the defendant's cause, consult with the defendant on important decisions, update the defendant on developments in the course of litigation, and "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. Defense counsel is entitled to a strong presumption of effectiveness to avoid "second-guessing" by the reviewing court. *Id.* at 689. *See also* United States v. Cronic, 466 U.S. 648, 666 (1984) (holding that no basis exists for an ineffective assistance of counsel claim absent a showing of "specific errors made by trial counsel").

50. *Strickland*, 466 U.S. at 687. Prejudice is presumed in three circumstances: actual or constructive denial of the assistance of counsel, state interference with counsel's assistance, and assistance rendered when counsel is subject to a conflict of interest. *Id.* at 692.

51. *Id.* at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In arriving at this "reasonable probability" standard, the Court expressly rejected the idea that a defendant need only show counsel's error had "some conceivable effect" on the outcome because nearly any error could satisfy that burden. *Id.* It also rejected the view that a defendant must show that counsel's conduct "more likely than not" affected the proceeding's outcome because that requirement would place too great a burden on the defendant. *Id.* at 693-94.

52. *Id.* (comparing the requirement to tests for the materiality of previously undisclosed exculpatory information and previously unavailable testimony).

B. Retroactivity in Habeas Corpus

A defendant in state custody is entitled to federal habeas corpus relief when she is in custody "in violation of the Constitution or laws or treaties of the United States."[53] An application for the writ will not be granted unless the petitioner has exhausted remedies available in state court.[54] The scope and purpose of the writ have changed considerably over the course of this century.[55] Members of the Court have variously characterized[56] the writ as a deterrent,[57] a federal court remedy,[58] an appellate review of constitutional claims,[59] a mechanism for correcting errors affecting "fundamental fairness,"[60] and a means of protecting petitioners with a colorable claim of innocence.[61]

Federal habeas corpus relief stands in tension with state court interests in finality, reliance, and comity.[62] The competing concerns of

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53. 28 U.S.C. § 2254 (1988).

54. *Id. But see* Engle v. Isaac, 456 U.S. 107, 110 (1982) (holding that a state prisoner barred by procedural default from raising a constitutional claim may advance it with a showing of cause and actual prejudice).

55. The history of the Great Writ is the subject of controversy among current members of the Court. *See* Wright v. West, 112 S. Ct. 2482, 2489 nn.6-7 (1992) (including a spirited debate between Justices Thomas and O'Connor on the history of federal habeas courts' standard of review of state court applications of law to fact). The Court recognized, however, a history of defining the scope of habeas by weighing both the costs and benefits of the writ. *See id.* at 2491.

56. The schema that follows is adapted from WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 28.2 (1992).

57. Teague v. Lane, 489 U.S. 288, 306 (1989). The Court noted that habeas serves as a "'necessary additional incentive for [state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" *Id.* (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

58. Butler v. McKellar, 494 U.S. 407, 431 (1990) (Brennan, J., dissenting). Brennan argued that Congress intended habeas review "to provide petitioners a *remedy* for unlawful state deprivations of their liberty interests through a fresh and full review of their claims by an Article III court." *Id.* at 427. A majority of the Court declared this view "manifest federal policy" in Fay v. Noia, 372 U.S. 391, 424 (1963).

59. Brown v. Allen, 344 U.S. 443 (1953). The Court held that even when state courts have rejected a petitioner's claims after a full and fair hearing, federal courts on habeas review must determine whether or not the state court "reached a satisfactory conclusion." *Id.* at 463.

60. *Teague*, 489 U.S. at 319 (1989) (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens contended that *Teague*'s retroactivity rule should include an exception for "new rules" that go to the "fundamental fairness" of state court proceedings. *Id.*

61. Kaufman v. United States, 394 U.S. 217, 232-33 (1969) (Black, J., dissenting).

62. *See* Wright v. West, 112 S. Ct. 2482, 2491 (1992) ("'[Habeas review] disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty.'") (citations omitted). *See also* Engle v. Isaac, 456 U.S. 107, 128 (1982) (noting that habeas review frustrates a state's power to punish criminals and honor constitutional rights). A state's interest in

the defendant's interest in fairness[63] and the state's interest in finality have led courts to promulgate standards to determine whether new rules of law[64] should be applied retroactively in habeas proceedings.[65] Originally, courts applied a single balancing test in cases on both direct and collateral review to determine whether new rules would apply retroactively.[66] The test weighed (a) the purpose of the new rule, (b) the extent to which law enforcement relied on old standards, and (c) the effect retroactive application of the new rule would have on the "administration of justice."[67]

The Court, in *Teague v. Lane*,[68] sought to rectify inconsistencies that resulted from applying this three-part standard to cases on collateral review.[69] *Teague* held that generally new constitutional rules of criminal procedure would not be applied to cases that become final on direct appeal before the new rules are announced.[70] The *Teague* Court grounded its retroactivity rule on the purposes of habeas corpus.[71] One function of habeas is to provide an incentive for state

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finality is not simply that a particular case remain undisturbed. Rather, the state's interest also contemplates its role as a competent, good faith interpreter of constitutional rights. *See Teague*, 489 U.S. at 309 ("'[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of *final competence to determine legality*.'") (emphasis added & omitted) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 450-51 (1963)).

63. The habeas petitioner has an interest in fairness because she is seeking a remedy for unlawful deprivation of her liberty interests. *See* 28 U.S.C. § 2254 (1988).

64. The standard for determining what constitutes a "new rule" has undergone some revision since it was announced in *Teague*. The precise standard adopted by the Court is unclear. *Teague* indicated that a case announces a new rule when it "breaks new ground or imposes a new obligation on the States or Federal Government." *Teague*, 489 U.S. at 301. The Court's decision in Butler v. McKellar, 494 U.S. 407 (1990), appears to have relaxed and broadened the new rule standard. According to the *Butler* Court, a decision may announce a new rule if the issue was "susceptible to debate among reasonable minds" as evidenced by a significant difference of opinion among the lower courts. *Id.* at 415. Though a plurality of the Court endorsed the *Butler* standard in *Wright*, Justices O'Connor, Blackmun, and Stevens maintained that the standard for a "new rule" is objective and not necessarily evidenced by the "mere existence of conflicting authority." *Fretwell*, 112 S. Ct. at 2497 (O'Connor, J., concurring in the judgment).

65. *See* Stovall v. Denno, 388 U.S. 293, 296-97 (1967) (affirming a three-part retroactivity test); *Teague*, 489 U.S. at 312-13 (adopting, with modifications, Justice Harlan's retroactivity rule for cases on collateral review).

66. *See Stovall*, 388 U.S. at 297.

67. *Id.* (citing favorably Johnson v. New Jersey, 384 U.S. 719 (1966)).

68. 489 U.S. 288 (1989).

69. *Id.* at 302. Under the balancing test, similarly situated defendants could be subject to different treatment. *Id.* A defendant in a case announcing a new rule was merely a "chance beneficiary" of that rule, even though subsequent habeas petitioners might not benefit from its retroactive application. *Id.* at 340 (Brennan, J., dissenting) (quoting Stovall v. Denno, 388 U.S. 293, 301 (1967)).

70. *Id.*

71. *Id.* at 306.

courts to conduct their proceedings "in a manner consistent with established constitutional standards."[72] The *Teague* retroactivity rule was consistent with this deterrence function because allowing courts to apply current law on habeas would remove an incentive for states to be good faith interpreters of the Constitution during initial proceedings.

The *Teague* Court adopted two exceptions to the retroactivity rule. It held that new rules will be applied retroactively on collateral review if (1) "[the new rule] places 'certain kinds of primary, private, individual conduct beyond the power of the criminal law-making authority to proscribe,'" or (2) if "[the new rule] requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[73] The Court read the second exception narrowly, holding that the new rule would be applied retroactively only if it both enhanced the accuracy of the trial court's determination and if it represented a major revision in our understanding of fundamental procedural rights necessary to a fair trial.[74]

The *Teague* Court did not directly address the applicability of its retroactivity rule in the context of a capital sentencing proceeding,[75] but it rejected the contention that its approach to retroactivity was "wholly inapplicable to the capital sentencing context."[76] Furthermore, it suggested in dicta that capital sentencing proceedings involve state finality interests comparable to those that exist in the guilt phase of trials.[77] In *Penry v. Lynaugh*,[78] a sharply divided Court agreed. Holding that state interests in finality outweigh defendants' interests in error-free proceedings even in the capital sentencing context,[79] the *Penry* Court found *Teague*'s retroactivity rule applicable in the capital sentencing context.[80]

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72. *Id.* (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

73. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 677, 692-93 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (citations omitted)).

74. *Id.* at 311-12.

75. *Id.* at 313 n.2.

76. *Id.* (Stevens, J., dissenting).

77. *Id.*

78. 492 U.S. 302 (1989).

79. *Id.* at 314.

80. *Id.*

IV. ANALYSIS

A. *Increased Requirements for a Prejudice Showing*

Fretwell expanded the prejudice showing required of a habeas petitioner seeking to advance an ineffective assistance of counsel claim under the Sixth Amendment. Declaring a prejudice showing based on "mere outcome determination" insufficient, the *Fretwell* Court maintained that, in order to prevail on an ineffective assistance of counsel claim, a petitioner must show "unfairness" resulting from the "depriv[ation] . . . of [a] substantive or procedural right to which the law entitles him."[81] Neither of the cases on which the Court relied—*Strickland v. Washington*[82] and *Nix v. Whiteside*[83]—provides support for this holding.

The prejudice test articulated in *Strickland* evaluated the impact of counsel's errors on the outcome of a trial.[84] Recognizing that errors by counsel always could have some conceivable impact on a trial's outcome, the *Strickland* Court required a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[85] The *Strickland* Court cautioned against mechanical application of the rule, noting that any review of ineffective assistance of counsel claims must focus on the "fundamental fairness" of the proceeding at issue.[86] Fairness in *Strickland* was measured by whether counsel's error caused a "breakdown of the adversarial process" central to reliable adjudication.[87] Invoking

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81. *Fretwell*, 113 S. Ct. at 844.

82. 466 U.S. 688 (1984).

83. 475 U.S. 157 (1986).

84. *Strickland*, 466 U.S. at 694. *See supra* notes 50-51 and accompanying text.

85. *Id.*

86. *Id.* at 696.

87. *Id.* In fact, the *Strickland* Court intended the prejudice test and its call for attention to "fundamental fairness" to create a *lesser* burden for defendants than the strict "outcome-determinative" test then in operation in several lower courts. *See id.* at 697. "With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today." *Id.*

The "outcome-determinative test" required a showing by defendants that, but for counsel's error, the outcome of the trial "more likely than not" would have been different. *See id.* at 693. The "more likely than not" standard comports with the test used to judge motions for new trials based on the discovery of new evidence. The *Strickland* Court found the standard inappropriate in the context of ineffective assistance of counsel assessments. *Id.* at 694. The Court asserted that it presupposed "that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Id.* Since ineffective assistance of counsel claims seek to challenge that very presupposition, the Court reasoned that the "reasonable probability" standard was more appropriate. *Id.*

Strickland's emphasis on "fairness," the *Fretwell* Court at once transformed it. It held that unfairness no longer results simply when the adversarial process malfunctions, but rather only when that malfunction has some effect on the defendant's substantive or procedural rights.[88] The Court required defendants to show an "*additional* indicia of unreliability, some specific way in which the breakdown of the adversarial process affected respondent's discrete trial rights."[89]

In support of its new prejudice requirement, the Court referred to its holding in *Nix v. Whiteside*.[90] In *Whiteside*, the habeas petitioner claimed that ineffective assistance of counsel should be presumed because his counsel was subject to a conflict of interest.[91] The "conflict of interest" Whiteside advanced, however, was a conflict between his interest in testifying falsely at trial and his counsel's ethical obligation to ensure that his client's testimony was not perjured.[92] The Court based its finding that Whiteside had suffered no prejudice on a rejection of this conflict of interest theory and the presumption of prejudice that accompanied it.[93] The Court rejected the theory because Whiteside "claimed a right the law simply [d]id not recognize,"[94] and noted that "every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means."[95]

The *Fretwell* Court found Fretwell's reliance on the now defunct right to a *Collins* objection comparable to the nonexistent right to perjure oneself claimed in *Whiteside*.[96] In so doing, the *Fretwell* Court ignored a principal difference between Whiteside and Fretwell: Fretwell had a right to an objection based on *Collins* at the time of his sentencing proceeding but Whiteside never had a right to present perjured testimony.[97] Consequently, Fretwell was not a member of the class of habeas petitioners against which the *Whiteside* holding was meant to guard. By disregarding the fundamental distinction be-

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88. *Fretwell*, 113 S. Ct. at 844 ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.").

89. *Id.* at 848 (Stevens, J., dissenting).

90. 475 U.S. 157 (1986).

91. *Id.* at 176. Prejudice is entitled to a limited presumption in cases of conflict of interest. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 186 (Blackmun, J., concurring).

95. *Id.* at 176.

96. *See Fretwell*, 113 S. Ct. at 845 ("[T]he impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration [under *Strickland*].") (O'Connor, J., concurring).

97. *Id.* at 841.

tween Fretwell's and Whiteside's claims, the *Fretwell* Court increased the burden on defendants by requiring them to demonstrate an injury to their existing substantive or procedural rights when advancing a prejudice claim under *Strickland.*

B. Hindsight Frame of Reference

To reach its holding that, under the prejudice prong of the *Strickland* test, a defendant must show that counsel's performance affected the outcome of her trial and denied her an existing substantive or procedural right, the *Fretwell* Court asserted that prejudice may be judged according to current legal standards, rather than those in effect at the time of the defendant's trial or sentencing.[98] Permitting this "hindsight" perspective had the effect of applying the "new rule" announced in *Perry v. Lockhart*[99] retroactively against Fretwell, even though Fretwell had completed direct review by the time *Perry* was decided. The Court attempted to support its use of a hindsight perspective with its holdings in *Strickland* and *Teague.*[100]

1. Hindsight and the prejudice prong.—The *Fretwell* Court asserted that a hindsight analysis of prejudice is permissible because the evaluation of prejudice does not give rise to the same concerns that militate against hindsight review of counsel's performance.[101] For example, permitting hindsight review of counsel's performance may deter defense counsel from accepting cases or attempting original trial strategies for fear of post-conviction "second guessing" by habeas review courts.[102] The *Fretwell* Court argued that these concerns are not at

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98. *Id.* at 844.

99. 871 F.2d 1384, 1393 (8th Cir. 1989) (holding that the fact that a killing was committed for pecuniary gain may be considered both an element of the offense of capital felony murder and an aggravating factor in a capital sentencing proceeding). The *Perry* holding overturned the *Collins* rule against "double counting." *See supra* notes 12-13 and accompanying text. Although the *Perry* rule constituted a "new rule" under the Court's previously articulated standards, *see supra* note 62, the Court did not directly address this issue in *Fretwell.* Instead, it merely accepted as "the premise of [its] grant in [the] case" that defendants such as Fretwell were no longer entitled to objections based on "double counting." *Fretwell,* 113 S. Ct. at 844.

The Court's assumption that the *Perry* holding constituted a new rule was evidenced, however, in its treatment of the retroactivity issue. *Id.* For example, the Court countered the dissent's opposition to the use of hindsight by arguing that no state finality interests were at issue in *Fretwell. Id.* Had the Court not regarded the *Perry* holding as a new rule, it could have disposed of the dissent's objection merely by stating that the rule at issue was not new, a much less controversial ground.

100. *Fretwell,* 113 S. Ct. at 844.

101. *Id.*

102. *Id.* (quoting *Strickland,* 466 U.S. at 690).

issue in the prejudice prong of the *Strickland* test because prejudice analysis focuses on the effect, rather than the substance, of counsel's judgment and performance.[103] Presumably because counsel's performance is not at issue in the prejudice analysis, a postconviction assessment of its effect would not deter counsel's "ardor" or "independence."[104]

The *Strickland* Court, however, intended the frame of reference of the prejudice inquiry to be the time of the proceeding at issue.[105] *Strickland* recognized that the purpose of the Sixth Amendment's guarantee of counsel was "to ensure that a defendant ha[d] the assistance necessary to justify reliance on the outcome of the proceeding."[106] Though prejudice is measured by considering the effect of counsel's performance on the *outcome* of the proceeding, an ineffective assistance claim implicates the *process* of the proceeding—that is, the trial or sentencing hearing itself.[107] The *Strickland* Court embraced a focus on process when it adopted the "reasonable probability" standard for showing, under the prejudice prong, that counsel's errors affected the outcome of the proceeding.[108] It rejected a stricter standard because such a standard would "presuppose that all the essential elements of a presumptively accurate and fair proceeding" were not in question.[109]

Because it is the "adversarial process" itself that is called into question, the *Strickland* Court maintained that the "governing legal standard [at the time of the proceeding at issue] play[ed] a critical role in defining the question to be asked in assessing the prejudice from counsel's errors."[110] Moreover, it held that a reviewing court should make its prejudice assessment through attention to "the totality of the evidence" before the court at the time of the proceeding.[111] If, as the *Strickland* Court contended, the objective of hearing ineffective assist-

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103. *Id.* ("[The prejudice test] focusses on the question [of] whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair.").

104. *See id.* (quoting *Strickland*, 466 U.S. at 690).

105. *Id.* at 849 ("[Assessing errors] based on the 'totality of the evidence before the judge or jury' . . . establishes its point of reference firmly at the time of trial or sentencing.") (Stevens, J., dissenting) (quoting *Strickland*, 466 U.S. at 695).

106. *Strickland*, 466 U.S. at 691-92..

107. *See id.* at 694 (explaining that ineffective assistance claims involve the "absence of one of the assurances" to which defendants are entitled as part of the *process* of the proceeding against them).

108. *Id.*

109. *Id.*

110. *Id.* at 695.

111. *Id.*

ance claims is to protect and affirm the adversarial process,[112] the *Fretwell* holding that a habeas review court may apply law made after the proceeding at issue is contradictory. The application of case law not in force at the time of trial or sentencing undermines the reliance on those proceedings that ineffective assistance claims were intended to protect. By requiring petitioners to advance their claims based on a "*post hoc* vision of what would have been the case years later,"[113] *Fretwell* increased unreliability and caprice in the habeas corpus review system.[114]

2. Hindsight and retroactivity.—In *Teague*, the Court held that "new rules" should not apply retroactively to a claim raised by a federal habeas petitioner on collateral review.[115] In *Fretwell*, however, the Court permitted retroactive application of a "new rule" on habeas review when neither the State nor the habeas petitioner had a reliance interest in the state court judgment made at the time of the original adjudication.[116] In so doing, the *Fretwell* Court obscured the inappropriateness of the *Teague* analysis in situations where defendants seek to avoid, rather than benefit from, new rules on collateral review.[117]

The *Teague* Court founded its retroactivity rule on both the states' reliance interests in their interpretations of federal law and the purposes for which habeas collateral review is available.[118] The *Teague* Court emphasized the deterrent function of habeas.[119] It held that the purpose of the habeas writ is to serve as a "necessary additional incentive for [state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established

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112. *See id.* at 686 ("The benchmark for judging any claim of uneffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

113. *Fretwell*, 113 S. Ct. at 849 (Stevens, J., dissenting).

114. *Id.* at 852 ("[T]he Court's decision marks a startling and most unwise departure from our commitment to a [habeas review] system that ensures fairness and reliability . . . .") (Stevens, J., dissenting).

115. Teague v. Lane, 489 U.S. 288, 310 (1989).

116. *Fretwell*, 113 S. Ct. at 844. The Court seemed to suggest that because the Supreme Court of Arkansas did not rely on *Collins* in reviewing Fretwell's claim, it would not be "penalized for relying on 'the constitutional standards that prevailed at the time the original proceedings took place.'" *Id.* (quoting *Teague*, 489 U.S. at 306). In other words, because the court neglected to invoke *Collins*, there was no "good faith interpretation of existing precedents" that needed to be validated by restraining the habeas court from applying new rules. *Id.*

117. *Id.*

118. *Teague*, 489 U.S. at 306 ("'The relevant frame of reference . . . is . . . the purposes for which the writ of habeas corpus is made available.'") (quoting Mackey v. United States, 401 U.S. 667, 675 (1971)).

119. *Id.*

constitutional standards."[120] The *Teague* rule recognized the competing interests of reliance and habeas review and sought to let them both operate within the scope of the retroactivity rule.[121]

Fretwell presented an unusual situation in that no state reliance issues were at stake in Fretwell's habeas petition. Because the *Collins* objection was never made at the sentencing proceeding, the State never made a "good-faith interpretation" of the precedent at issue, namely *Collins*.[122] Confronted with a petitioner seeking to avoid retroactive application of a new rule, the *Fretwell* Court, instead of finding that the petitioner had no *liberty* interest in a habeas remedy, grounded its denial of relief on the habeas petitioner's lack of a *finality* interest.[123] The *Fretwell* Court thus ignored the fact that *Teague*'s retroactivity rule was founded on both the petitioners' interest in a habeas remedy and the state's interest in finality.[124]

In basing its retroactivity argument on the petitioner's lack of finality interests, the *Fretwell* Court failed to acknowledge that the case before it raised an issue that it had not addressed previously in *Teague* or its progeny.[125] *Teague* considered the retroactivity on collateral review of "new rules" that had the effect of *benefitting* petitioners' habeas claims.[126] The petitioner in *Fretwell*, however, sought to *avoid* the application of the new rule announced in *Perry*.[127] Moreover, the petitioner in *Fretwell* was uniquely situated. Given that the judge in Fretwell's sentencing proceeding did not rule on the permissibility of a *Collins* objection,[128] there was no "good-faith interpretation" of federal law that needed protecting under the retroactivity rule. Because

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120. *Id.* (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

121. This principle is evident in the Court's adoption of the two exceptions to its retroactivity rule. *See supra* note 332. The exceptions are evidence of the Court's recognition that the importance of the states' interests in reliance recedes where a petitioner's interest in a trial free of constitutional error is at issue.

122. *Fretwell*, 113 S. Ct. at 844.

123. *Id.*

124. *Teague*, 489 U.S. at 306, 309. *See also supra* notes 115-117 and accompanying text.

125. *See, e.g.*, Sawyer v. Smith, 497 U.S. 227 (1990) (holding that retroactivity should protect reasonable good-faith interpretations by the states); Butler v. McKellar, 494 U.S. 407 (1990) (holding that a "new rule" is announced whenever there is a "reasonable disagreement" among courts as to prior precedent); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that a "new rule" is not created when a decision merely "fulfills the assurance" of prior precedent). *See also* Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 391 (1990) (discussing the impact of *Teague* on retroactivity jurisprudence of the lower federal courts).

126. *Teague*, 489 U.S. at 294.

127. *Fretwell*, 113. S. Ct. at 841.

128. *Id.* at 844.

the *Fretwell* Court failed to expressly address this difference and its implications for the Court's retroactivity jurisprudence, lower courts may read the *Fretwell* holding broadly to allow the retroactive application of "new rules" on habeas whenever they benefit a state, even if a state has made a prior "good faith interpretation" of the existing federal law.[129]

Indeed, one lower court has already invoked this more expansive reading of *Fretwell*. In *Wedra v. Lefevre*,[130] a defendant brought a habeas petition in federal court claiming ineffective assistance of counsel for his attorney's failure to present evidence rebutting the prosecution's claim that he had fled from the scene of a murder.[131] The petitioner had already defaulted on direct appeal by failing to seek appeal within the thirty days required by New York law.[132] The district magistrate judge held an evidentiary hearing on the habeas petition and, nineteen months later, held that while the petitioner's claim was not procedurally barred, it should be denied on the merits.[133] Five months after the issuance of the report, the Supreme Court decided *Coleman v. Thompson*.[134] In *Coleman*, the Court held that if a state prisoner has defaulted on his federal claims in state court, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice . . . or . . . that failure to consider the claims will result in a fundamental miscarriage of justice."[135] Nearly one year later in *Wedra*, the district court retroactively applied *Coleman* and denied the petition.[136]

Citing the retroactive application of *Coleman* as a violation of his due process rights, the petitioner appealed.[137] Relying on *Fretwell*, the Second Circuit held that when a court is faced with a habeas petitioner who is relying on an old rule in the face of a new rule that is adverse to his interests, the court may apply the new rule retroactively because the defendant has no finality interest in the state court deci-

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129. Twenty-two states advocated this interpretation in their amici brief filed in *Fretwell*. Brief of the States of California, Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Kentucky, Montana, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, Washington, and Wyoming as Amici Curiae in support of Petitioner at 8, Lockhart v. Fretwell, 113 S. Ct. 838 (1993) (No. 91-1393).

130. 988 F.2d 334 (2d Cir. 1993).

131. *Id.* at 337-38.

132. *Id.*

133. *Id.*

134. 111 S. Ct. 2546 (1991).

135. *Id.* at 2565.

136. *Wedra*, 988 F.2d at 338.

137. *Id.*

sion.[138] Because, under the *Coleman* rule, Wedra's petition was procedurally barred, the court denied his petition for habeas corpus.[139]

C. *Policy Impact on Habeas Corpus*

Justice O'Connor maintained in her concurrence that the Court's decision in *Fretwell* was a narrow one simply nullifying a factor that ought not to inform the prejudice inquiry of ineffective assistance of counsel claims.[140] As is clear from at least one lower court's reading of *Fretwell*, however, the decision has a potentially broader reach.[141] *Fretwell* may be taken to stand for the proposition that in defending against habeas petitions, states may assert case law decided subsequent to the close of a petitioner's direct appeal whenever the state will benefit from that law.[142] Thus, *Fretwell* may be read as creating a third exception to *Teague*. New rules may now be applied retroactively when (1) they make certain activities that once were illegal no longer illegal, (2) they represent watershed doctrines of criminal procedure,[143] or (3) they benefit the state.

Given this reading of the Court's retroactivity jurisprudence, states responding to habeas petitioners in federal court may have a new tactic at their disposal. When petitioners seek the benefit of case law in force at the time of their trials or sentencing proceedings, states may argue that those interpretations have been overruled by subsequent decisions, and that the new rules can be applied retroactively because the petitioners have no finality interest in the earlier proceedings.[144] Consequently, a state may be able to defend against a habeas petition by undermining confidence in its own constitutional interpretation in force at the time of the state proceeding. This implication of *Fretwell* contradicts the policy underlying retroactivity. Retroactivity was intended to "validate[ ] reasonable, good-faith interpretations of

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138. *See id.* at 341.

139. *Id.*

140. *Fretwell*, 113 S. Ct. at 845 (O'Connor, J., concurring).

141. *See supra* notes 127-136 and accompanying text.

142. It remains to be seen whether other lower courts or the Supreme Court itself will clarify the retroactivity doctrine applicable when petitioners seek to avoid application of "new rules." The *Fretwell* Court stopped short of adopting an explicit retroactivity doctrine even though it could have done so on the facts of the case, and even though 22 states advocated such a ruling in their amici brief. Amici Brief at 8, *Fretwell* (No. 91-1393). The Court's refusal to adopt a clear rule for future applications may suggest that the *Fretwell* holding was intended to be limited to its facts.

143. *See supra* note 32 for a discussion of the first two exceptions.

144. This new tactic is of one piece with the "systematic bias in favor of narrow interpretations of criminal procedure protections" created by Butler v. McKellar, 494 U.S. 407, 422 (Brennan, J., dissenting).

. . . precedents [existing at trial] made by state courts *even though they are shown to be contrary to later decisions.*"[145] Thus, the retroactive application of "new rules" will operate to thwart the goal of the retroactivity rule to protect finality in state court decisions.

CONCLUSION

In *Fretwell*, the Court increased the requirements for a showing of prejudice in ineffective assistance of counsel claims and expanded the applicability on collateral review of new rules that benefit states in habeas petitions. The Court altered its prejudice standard without basis in the prior case law that it invoked as support. More significantly, it allowed a "new rule" benefitting the State to be applied on habeas review. Though the sweep of the *Fretwell* view of retroactivity is unclear, lower courts may interpret the case as permitting the retroactive application of "new rules" whenever such rules benefit a state's defense against habeas petitioners.

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145. *Fretwell*, 113 S. Ct. at 844 (emphasis added).